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Supreme Court of the United States

October Term, 1966

No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, *AMICUS CURIAE*

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BRIEF OF NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, *AMICUS CURIAE*

The two proceedings before this Court on writ of certiorari to the California Supreme Court present the single question whether a provision recently added to the California Constitution violates the Constitution and laws of the United States. In each case, it was asserted that the owner of housing accommodations had violated a California statute prohibiting discrimination in the sale or

rental of housing on the basis of race, religion or national origin. In each case, the owner asserted that the statute had been invalidated by a clause added to the California Constitution by action of the voters on Election Day in 1964, on what was popularly known as "Proposition 14." The operative part of the clause, which is now Article I, Section 26 of the California Constitution, reads as follows:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

The Supreme Court of California, on May 10, 1966, issued its decisions[1] in these cases holding that Article I, Section 26, violated the Equal Protection Clause of the Fourteenth Amendment.

Interest of the *Amicus*

This brief is filed, with the consent of the parties, on behalf of the National Committee Against Discrimination in Housing. The National Committee was founded in 1950. Its constitution specifies the following purpose:

> "To eliminate prejudice and discrimination, to lessen neighborhood tensions, to defend human and civil rights secured by law, * * *

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1. *Mulkey* v. *Reitman*, 64 Cal. 2d 529, 413 P. 2d 825; *Prendergast* v. *Snyder*, 64 Cal. 2d 877, 413 P. 2d 847.

Its member organizations are as follows:

AFL-CIO
Amalgamated Clothing Workers of America, AFL-CIO
American Baptist Convention
American Civil Liberties Union
American Council on Human Rights
American Ethical Union
American Friends Service Committee
American Jewish Committee
American Jewish Congress
American Newspaper Guild, AFL-CIO
American Veterans Committee
Americans for Democratic Action
Anti-Defamation League of B'nai B'rith
Brotherhood of Sleeping Car Porters, AFL-CIO/CLC
Commonwealth of Puerto Rico, Department of Labor, Migration Division
Congress of Racial Equality—CORE
Cooperative League of the USA
Friendship House
Industrial Union Department, AFL-CIO
International Ladies' Garment Workers' Union, AFL-CIO
International Union of Electrical, Radio and Machine Workers, AFL-CIO
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
Jewish Labor Committee
League for Industrial Democracy
The Methodist Church
NAACP Legal Defense and Educational Fund, Inc.
National Association for the Advancement of Colored People—NAACP
National Association of Housing Cooperatives
National Association of Negro Business and Professional Women's Clubs
National Catholic Conference for Interracial Justice
National Committee on Tithing in Investment
National Community Relations Adivsory Council
National Council of Churches of Christ
National Council of Jewish Women
National Council of Negro Women
National Urban League
Protestant Episcopal Church
Scholarship, Education and Defense Fund for Racial Equality
Southern Regional Council
Synagogue Council of America
Union of American Hebrew Congregations
Unitarian Universalist Association
United Church of Christ
United Presbyterian Church
United Steelworkers of America, AFL-CIO
Young Women's Christian Association

The National Committee submits this brief because Article I, Section 26 represents, in California and in all other states, a most potent device for indurating racial segregation in housing. The language of Article I, Section 26 is general and unqualified. No effort is made to catalogue the considerations which the amendment would immunize against state regulation or prohibition in a landowner's determination to withhold property from particular individ-

uals. Rather, by vesting "absolute discretion" in the property owner with respect to the disposition of his property, the amendment attempts to extend state constitutional protection to both reasonable and unreasonable motivations, ethical and unethical considerations, reasons that undermine the general welfare as well as those that do not, for selecting and rejecting willing buyers and renters.

The major impact of the amendment falls upon members of minority groups. A constitutional amendment was not needed to permit property owners to withhold a leasehold from lessees with pets, to withhold property in a senior citizens community from purchasers who do not meet an age requirement, or to withhold property for any number of considerations under commonly accepted tenets of desirable social and economic behavior. However, in recent years, the withholding of real property on purely racial or religious grounds and the resultant creation of segregated housing which denies equal opportunity for one of the essentials of living has been made the occasion for legal redress in California. Article I, Section 26 was proposed and passed for the precise objective of reversing that trend by granting and guaranteeing the right to discriminate on racial and religious grounds in the selling and leasing of real property.

The language of the amendment achieves that purpose. Under the phraseology used—"absolute discretion" and "decline to sell"—all Mexicans seeking homes in Los Angeles may be turned away because of their national origin by owners whose houses are on the market; all Japanese farmers may be denied farmland in the San Joaquin Valley

because they are not Caucasian; all Negroes in San Francisco may be told that they cannot rent apartments because of the color of their skin; all Jews may be excluded from a housing project because of the way they worship God. In those instances, at least, the amendment undeniably would sanction discrimination. It would even legalize total exclusion of specified groups from whole communities.

It is the position of Amicus that Article I, Section 26 of the California Constitution, by granting immunity from the sanctions of state law to those who discriminate against minority groups in selling or leasing homes, by withholding redress of state law from those who suffer such discrimination and by arbitrarily precluding the effective exercise of state power to deal with the evils and dangers to the state resulting from discrimination in the transfer of real property, is in conflict with the Constitution and laws of the United States.[2]

Questions to Which this Brief is Addressed

1. Whether, in view of the fact that discrimination against minority groups dominates the market for housing and deprives minority groups of equal opportunity to obtain housing, California, by adopting Article I, Section 26

2. We have been authorized by the following organizations to state that they support the arguments set forth in this brief and wish to be viewed as joining in its presentation: AFL-CIO; American Civil Liberties Union; American Jewish Committee; American Jewish Congress; Anti-Defamation League of B'nai B'rith; Industrial Union Department, AFL-CIO; International Ladies' Garment Workers' Union, AFL-CIO; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); NAACP Legal Defense and Educational Fund, Inc.; National Association for the Advancement of Colored People; and Scholarship, Education and Defense Fund for Racial Equality.

has violated its obligation to take appropriate action to prevent inequality in housing imposed upon it by the Equal Protection Clause of the Fourteenth Amendment.

2. Whether Article I, Section 26 violates the guarantee in 42 U. S. C., Section 1982 of the right of all citizens to equal opportunity to purchase or lease property without discrimination based on race.

ARGUMENT

POINT ONE

The State of California has given legislative recognition to the existence and evil effects of discrimination in housing against minority groups.

A. Discrimination against minority groups dominates the housing market in California

The ghetto pattern that disfigures residential areas throughout the United States, including California, has been revealed in every study made of the subject, whether by public agencies or by private institutions. It means, in practice, that almost every housing unit placed on the market, for sale or rental, for slum dwellers or for millionaires, bears an invisible label marking it as available for whites only or for Negroes only. As a result, large numbers of Negroes and members of other minority groups are denied the opportunity to purchase housing adequate for their needs which they could otherwise afford and are compelled to live in racially segregated areas of poorer quality and status.

In 1961, the U. S. Commission on Civil Rights observed:[3]

> In 1959 the Commission found that "housing * * * seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay." Today, 2 years later, the situation is not noticeably better.
>
> Throughout the country large groups of American citizens—mainly Negroes but other minorities too—are denied an equal opportunity to choose where they will live. Much of the housing market is closed to them for reasons unrelated to their personal worth or ability to pay. New housing, by and large, is available only to whites. And in the restricted market that is open to them, Negroes generally must pay more for equivalent housing than do the favored majority. "The dollar in a dark hand" does not "have the same purchasing power as a dollar in a white hand."

And the California Advisory Committee to the U. S. Commission on Civil Rights has reported:[4]

> The State of California has a large and increasing Negro population. These people live mainly in segregated patterns in the major urban centers of the State. In most cases, Negro housing areas are considerably less attractive than housing in other areas.

* * *

3. Report of the U. S. Commission on Civil Rights, Book 4, Housing, p. 1 (1961). See also, Report of the President's Committee on Civil Rights, *To Secure These Rights*, pp. 67-70 (1947); Myrdal, *An American Dilemma*, pp. 618-27 (1944); Weaver, *The Negro Ghetto* (1948); Abrams, *Forbidden Neighbors*, pp. 70-81, 137-49, 150-190, 227-243 (1955); Commission on Race and Housing, *Where Shall We Live?*, pp. 1-10 (1958); Report of the U. S. Commission on Civil Rights, pp. 336-374 (1959).

4. U. S. Commission on Civil Rights, "50 States Report", pp. 43-46 (1961).

> As California's Negro population increases, pressure builds up in the great urban ghettos, and slowly but perceptibly the segregated areas enlarge. The Committee found that, as a general rule, Negro families do not move individually throughout the community. They move as a group. This is true in most cases of the relatively high-wage Negro professional group. It is practically universally true of Negroes in the lower mass group.
>
> This Negro housing problem is widespread. Negroes encounter discrimination not only where houses in subdivisions and in white neighborhoods are concerned but also in regard to trailer parks and motels. Testimony received by the Committee indicated that the trailer-park situation is particularly acute and that, especially in the southern part of the State, few, if any, trailer parks will accept Negroes.[5]

Unquestionably there is an established pattern of segregation in housing, and in the sale and rental of real estate, in California.

B. Residential segregation in California has harmful effects.

Because of the pervasive nature of discrimination in housing, we have in effect two housing markets, one for whites and one for non-whites. The resulting oppressive effects on the direct victims of discrimination and on the interests of the state as a whole are readily demonstrated.

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5. The existence of housing bias in California's two principal metropolitan areas is further documented in McEntire, *Residence and Race* (1960), in a chapter (pp. 32-67) studying residential patterns in 12 large cities representing the major regions of the country, including Los Angeles and San Francisco. See particularly the maps showing racial concentration in those two cities, pp. 61-66.

1. The most obvious price paid by those who are discriminated against is a loss of freedom. "The opportunity to compete for the housing of one's choice is crucial to both equality and freedom," declares the Commission on Race and Housing.[6]

Within their financial limits, majority groups in America are free to choose their homes on the basis of a number of factors germane to their pursuit of happiness: the size of house needed to accommodate the family; preferences for particular styles of housing or kinds of neighborhoods; the availability of community facilities such as churches, schools, playgrounds, clubs, shopping, and transportation.

This freedom of choice is denied members of minority groups. Granted the means a non-white person may buy any automobile, any furniture, any clothing, any food, any article of luxury offered for sale. But it is not possible for a non-white American to bargain freely, in an open, competitive market, for the home of his choice, regardless of his intellect, integrity or wealth.

The U. S. Commission on Civil Rights, referring to the "white noose around the city," has said:[7]

> There may be relatively few Negroes able to afford a home in the suburbs, and only some of these would want such homes, but the fact is that this alternative is generally closed to them. It is this shutting of the door of opportunity open to other Americans, this confinement behind invisible lines, that makes Negroes call their residential areas a ghetto.

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6. Report of Commission on Race and Housing, Where Shall We Live?, p. 3 (1958).

7. Commission on Civil Rights, 1959 Report, p. 378.

Housing discrimination also abridges the right of the majority group owner freely to sell or rent his property. The mechanics of the dual, segregated housing market restrict the market within which the white seller may find prospective purchasers. For practical purposes, he is compelled by the prevailing practices in the housing market to offer his house to whites only or to Negroes only.

2. Housing discrimination imposes a heavy economic penalty on the Negro. As the U. S. Commission on Civil Rights pointed out in the portion of its 1961 Report quoted above, "Negroes generally must pay more for equivalent housing than do the favored majority."[8] This is because the discriminatory practices that hold down the supply of housing available to Negroes inevitably raise the price or rent they must pay.

McEntire, after reviewing all past studies as well as those conducted for the Commission on Race and Housing, concluded:[9]

> Racial differences in the relation of housing equality and space to rent or value can be briefly summarized. As of 1950, nonwhite households, both renters and owners, obtained a poorer quality of housing than did whites at all levels of rent or value, in all regions of the country. Nonwhite homeowners had better quality dwellings than renters and approached more closely to the white standard, but a significant differen-

8. Similarly, the Commission on Race and Housing, in its Report, *Where Shall We Live?* (1958), p. 36, said: "* * * segregated groups receive less housing value for their dollars spent than do whites, by a wide margin."

9. *Op. cit. supra*, p. 155.

tial persisted, nevertheless, in most metropolitan areas and value classes. * * *

3. Other, less tangible, injuries are inflicted on the victims of discrimination in housing, with resultant evil effects on the state itself.[10] "All of our community institutions reflect the pattern of housing," the president of the Protestant Council of New York has stated. "It is indescribable, the amount of frustration and bitterness, sometimes carefully shielded, but the anger and resentment in these areas can scarcely be overestimated and can hardly be described; and this kind of bitterness is bound to seep, as it has already seeped, but increasingly, into our whole body politic." He said he could "think of nothing that is more dangerous to the nation's health, moral health as well as physical health, than the matter of these ghettos."[11]

Residential discrimination and segregation impede the social progress and job opportunities of minority groups, and deprive the whole community of the contributions these Americans might otherwise make. It is questionable whether we can fully comprehend the enormous harm to the individual and to the community in terms of waste of human and economic resources.

4. Perhaps the most notorious effect of the ghetto system is its creation of slums, with all their attendant evils —to the slum dweller and to the public weal. As we have seen, housing bias compels non-white groups to live in the

10. See, in particular, Clark, Prejudice and Your Child (1955), pp. 39-40.

11. U. S. Commission on Civil Rights, 1959 Report, p. 391.

restricted areas available to them. The California Supreme Court summarized the results as follows in *Burks* v. *Poppy Construction Co.*, 57 Cal. 2d 463, 471 (1962):

> Discrimination in housing leads to lack of adequate housing for minority groups [citations omitted], and inadequate housing conditions contribute to disease, and immorality.

In 1959, the U. S. Commission on Civil Rights described the effects of residential discrimination as follows: "The effect of slums, discrimination and inequalities is more slums, discrimination and inequalities. Prejudice feeds on the conditions caused by prejudice. Restricted slum living produces demoralized human beings—and their demoralization then becomes a reason for 'keeping them in their place' * * * Not only are children denied opportunities but the city and nation are deprived of their talents and productive power." The Commission reported that a former Secretary of Health, Education and Welfare estimated the national economic loss at 30 million dollars a year, representing the diminution in productive power of those who by virtue of the inferior status imposed upon them were unable to produce their full potential.[12]

Two years later, the Commission reiterated its conclusion and added: "These problems are not limited to any one region of the country. They are nationwide and their implications are manifold * * *"[13]

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12. U. S. Commission on Civil Rights, 1959 Report, p. 392; Commission on Race and Housing, *op. cit. supra*, pp. 5, 36-38; Groner & Helfeld, Race Discrimination in Housing, 57 Yale L. J. 426, 428-9 (1948).

13. U. S. Commission on Civil Rights, 1961 Report, Book 4, "Housing," p. 1. See also McEntire, *op. cit. supra*, pp. 93-94.

5. The racial patterns of the slums resulting from housing bias severely impede programs of slum clearance and urban renewal. The price paid for these civic improvements in terms of forced moves and disrupted lives, is often borne most heavily by the minority families that live in the cleared areas.

The problem has been fully described by the U. S. Commission on Civil Rights.[14] It points out that minorities are frequently the principal inhabitants of the areas selected for slum clearance or urban renewal.[15] But each of these programs depends for success on the ability to relocate some or all of the slum dwellers. Urban renewal obviously contemplates the destruction or renovation of obsolete slum buildings, the residents of which must of course move. If they are simply moved to another segregated area, adding to its population densities, a new slum is created. In those circumstances, the renewal program represents little in the way of net reduction of slums.

As Albert M. Cole, former Federal Housing and Home Finance Administrator, has said:[16]

14. U. S. Commission on Civil Rights, 1961 Report, Book 4, "Housing," c. 4: "Urban Renewal," especially pp. 82-83. See also Commission on Race and Housing, *op. cit. supra*, pp. 37-40.

15. From the beginning of the Federal urban renewal program in 1949 up to 1960, slum clearance and urban renewal projects had relocated 85,000 families. Of the 61,200 families whose color is known, 69% were non-white. Housing & Home Finance Agency, Relocation from Urban Renewal Project Areas through June 1960, p. 7 (1961).

16. "What is the Federal Government's Role in Housing?" Address to the Economic Club of Detroit, Feb. 8, 1954, quoted in Report of the Commission on Race and Housing, Where Shall We Live?, p. 40 (1958).

> Regardless of what measures are provided or developed to clear slums and meet low-income housing needs, the critical factor in the situation which must be met is the fact of racial exclusion from the greater and better part of our housing supply. * * * No program of housing or urban improvement, however well conceived, well financed, or comprehensive, can hope to make more than indifferent progress until we open up adequate opportunities to minority families for decent housing.

The California Advisory Committee to the U. S. Commission on Civil Rights discovered that these factors were in full operation in that State, with clearly visible harm to the Negro population. It reported:[17]

> The Committee found that concentration of Negro families into certain specified areas within California cities seems to be augmented, rather than alleviated, by urban renewal projects. It appears that Negroes displaced by such projects tend to find alternative housing in pre-existing Negro sections. There seems to be little effort to guide displaced families in their selection of homesites. The project moves forward and Negro families along with other groups, must quickly find new homes. More often than not these Negro families settle in adjacent ghettos already in existence.
>
> As the proportion of minority group members is extremely high in the so-called "blighted areas" of our State's larger cities, this is a major problem for those concerned with civil rights and minority housing.

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17. 50 States Report, *supra*, p. 45.

6. The harmful effects of residential segregation are not limited to housing. A conspicuous feature of the ghetto system is its tendency to produce segregation in education and all other aspects of our daily lives.[18] It is primarily responsible for the wide-spread *de facto* segregation that hampers Negroes and persons of Puerto Rican and Mexican origin in urban public schools.[19] It has even impaired the job opportunities opened up by fair employment laws.[20]

One of the most disturbing features of the physical pattern of segregation, whether in housing or otherwise, is that it builds the attitudes of racial prejudice which, in turn, strengthen the segregated conduct patterns. This was recognized two decades ago by a Presidential Committee:[21]

> For these experiences demonstrate that segregation is an obstacle to establishing harmonious relationships among groups. They prove that where the artificial barriers which divide people and groups from one another are broken, tension and conflict begin to be re-

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18. Myrdal, An American Dilemma, p. 618 (1944); Commission on Race and Housing, *op. cit. supra*, pp. 35-36.

19. Maslow, De Facto Public School Segregation, 6 Vill. L. Rev. 353, 354-5 (1961). In its 1959 Report, the U. S. Commission on Civil Rights said (at p. 545): "The fundamental interrelationships among the subjects of voting, education, and housing make it impossible for the problem to be solved by the improvement of any one factor alone." See also pp. 389-90.

20. N. Y. State Commission Against Discrimination, In Search of Housing, A Study of Experiences of Negro Professional and Technical Personnel in New York State (1959).

21. Report of the President's Committee on Civil Rights, To Secure These Rights, pp. 82-7 (1947).

placed by cooperative effort and an environment in which civil rights can thrive.[22]

7. All the evils discussed above combine to create the gravest danger of all to the security of society—the ever present threat of violent race conflict. Virtually every instance of such violence in the last two decades—outside of the South—has reflected the ghetto system. It has arisen either out of efforts by Negro families to move into previously all white areas or out of the tensions that build up within the ghetto. It is enough to remind this Court of the riots of 1965 in the Watts and other Negro districts of Los Angeles that caused the loss of 34 lives and property damages estimated at $40,000,000.[23] California would not have had a Watts riot if it had not had a Watts in the first place.

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22. The impact of housing discrimination is not limited to citizens of our country. The California Advisory Committee to the U. S. Commission on Civil Rights confirms this (50 States Report, *supra*, p. 46):

> Discrimination in housing directed against Negroes has had an unfortunate impact on foreign students whose skin colors are dark. The Committee heard testimony from an Indian student at Sacramento State College who indicated that he had been refused accommodations in a number of instances because of his color. The testimony of student government leaders at the same school indicated that this foreign student problem is significant. Commendably, student groups at Sacramento State are trying to do something about this situation through investigation and conference.
>
> The Committee is very disturbed by the evident impact of discriminatory treatment on foreign students whose preconceptions about American democracy have been rudely upset. These students are potential leaders in their own countries and the image of America which they take back with them can be significantly tarnished by such experiences.

23. "Violence in the City—An End or a Beginning," Report by the Governor's Commission on the Los Angeles Riots (Dec., 1965), p. 1.

C. The State of California has recognized the existence and harmful effects of racial discrimination in housing by enacting legislation against such discrimination.

The State of California has given formal recognition to the existence and evil effects of discrimination based on race, religion or national origin by the enactment of anti-bias legislation. It is true that, as we note below, its policy has been far from consistent, particularly in housing. At times, in fact, its laws have affirmatively facilitated and even required discrimination. In recent years, however, until the approval of Article I, Section 26 by referendum, the California Legislature has recognized reality by moving progressively to curb the ghetto system.

In 1959, California enacted a measure known as the "Hawkins Act" which prohibited discrimination in "publicly assisted housing accommodations."[24] In the same year, it adopted the "Unruh Act" which revised its law dealing with places of public accommodation to make it applicable to "all business establishments of every kind whatsoever."[25] This law was subsequently held to apply to those in the business of selling or leasing residential housing.[26]

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24. Cal. Stats. 1959, c. 1681, pp. 4074-7, Health and Safety Code, sections 35700-35741.

25. Cal. Stats. 1959, c. 1866, p. 4424, Cal. Civil Code, Secs. 51-52 (1965).

26. *Lee* v. *O'Hara*, 57 Cal. 2d 476, 370 P. 2d 321 (1962) (real estate brokers); *Burks* v. *Poppy Construction Co.*, 57 Cal. 2d 463 (1962) (developer of a tract of single family homes).

In 1963, California enacted the measure popularly known as the "Rumford Act," which added sections 35700-35744 to the Health and Safety Code[27] and replaced the provisions of the "Hawkins Act." The Rumford Act was broader than the Hawkins Act in covering, *inter alia*, residential housing containing more than four units, even though not publicly assisted. In addition, the Legislature vested the exclusive authority to administer the Rumford Act in the Fair Employment Practice Commission. The legislative policy which the Rumford Act implemented is expressed as follows (Health and Safety Code, sec. 35700):

> The practice of discrimination because of race, color, religion, national origin, or ancestry in housing accommodations is declared to be against public policy.
>
> This part shall be deemed an exercise of the police power of the State for the protection of the welfare, health, and peace of the people of this State.

The existence and evil effects of discrimination in housing have been recognized not only by the legislative branch of the state government but also by its judicial branch. *Burks* v. *Poppy Construction Co., supra*, 57 Cal. 2d at 471; *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 881 (1963).

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27. Cal. Stats. 1963, c. 1853, Sec. 2, p. 3823.

POINT TWO

Article I, Section 26 violates the Equal Protection Clause of the Fourteenth Amendment by encouraging, empowering and facilitating discrimination in housing against minority groups.

A. The Fourteenth Amendment requires the states to take appropriate action to prevent inequality in housing.

Article I, Section 26, if valid, would disable the state and local legislative bodies of California from acting to prevent discrimination by the owners of housing in sales or rentals.[28] It would also preclude the state judiciary from developing and applying common law principles that limit such discrimination in any manner. At one stroke, it would greatly limit if not undo the effect of all existing state regulation in this field, prohibit future action at any level of state government and assure to private owners of realty freedom from any state restraint on creation of the discriminatory housing conditions that create many of California's serious social problems. We suggest that the strictures of the Fourteenth Amendment cannot be so easily avoided in matters of governmental responsibility.

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28. Article I, Section 26 applies only to sales and rentals by the property owner. Presumably, therefore, it leaves the existing state laws in effect insofar as they apply to discrimination initiated by real estate brokers and discrimination by banks and other institutions in the financing of housing. It also goes without saying that this provision, even if valid, does not suspend the limitations of the Thirteenth and Fourteenth Amendments insofar as they apply to housing benefitted by "state action." Neither does it affect the power of the Federal Government to deal with housing bias by legislation, such as 42 U. S. C. Sec. 1982 referred to below, or by executive action, such as the Executive Order issued by President Kennedy in 1962 barring discrimination in housing receiving certain forms of Federal assistance. Executive Order No. 11063, 27 Fed. Reg. 11527 (1962).

The purpose of the Fourteenth Amendment was to protect the rights of minority groups with respect to activities in which, under our political system, the state is expected to play a role. When this Court originally construed that Amendment as dealing only with "state action," it did so on the assumption that the states would act appropriately to prevent abuse of their legal systems so as to permit denials of equal opportunity. Thus, in the *Civil Rights Cases*, 109 U. S. 3 (1883), where it held that the Federal Government did not have power to prohibit discrimination by private parties in operating places of public accommodation, it proceeded on the assumption that individual rights "may presumably be vindicated by resort to the laws of the State for redress" (109 U. S. at 17). It said (at 19):

> We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

It also said (at 25):

> Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.

This Court thus made it plain that our federal system of government posits a responsibility on the part of the states to prevent inequality through protection of individual

rights. That responsibility, like "state action," is an expanding concept. Governmental responsibility generally has necessarily grown with the proliferation of complex problems in contemporary life. State and individual have more points of contact today than in years gone by. In the same way, the need for state action to insure equality in basic rights has grown.

As we have shown in Point One, California is scarred by minority group ghettoes that cause severely harmful effects both for the minority groups directly affected and for the public at large. Those evil effects have been highlighted by the tragic events of the Watts riots of 1965 and the official report on its causes and consequences.

California, like 16 other states,[29] has recognized the obligation that these facts impose upon it by enacting appropriate legislation to curb housing bias. By now adopting Article I, Section 26, which in effect repudiates that obligation, California has violated the mandate of the Fourteenth Amendment.

B. The momentum of California's involvement in regulation of discrimination in housing makes its facilitation of discrimination state action within the reach of the Fourteenth Amendment.

What is at stake here is the shaping of residential areas. To a large extent, in our present complex society, that is already done or controlled by state action—in the form of zoning regulations, building restrictions, control over con-

29. The statutes are listed and summarized in "The Fair Housing Statutes and Ordinances," Report of the National Committee Against Discrimination in Housing (June, 1966).

struction of roads and other forms of transportation as well as the supply of public utilities and many other factors that determine the nature of a community. Where there is no regulation by the state of sales and rental policies, those who own and control housing have the power to create a pattern of segregation and impose it on a state's entire complex of residential areas. Experience shows that they do just that and that the result is that large segments of the population are denied equal opportunities because of their race, religion or national origin and are consequently compelled to live in squalid, disease-breeding ghettoes which create festering dangers to society.

On the basis of that experience, California recast its laws so as to break the pattern of segregated housing. We submit that this was, in effect, a fulfillment of its obligation, discussed in the preceding section, to use its legislative powers to create and enforce individual rights so as to prevent inequality. But whether or not we are right in this, it is plain that regulation of the racial character of neighborhoods so as to prevent denial of equality has become an accepted aspect of government in California. Whether or not California has an obligation to undertake such regulation, it has done so. We submit that this Court's decision in *Evans* v. *Newton,* 382 U. S. 296 (1966) establishes that any further action by the state in this area must be judged on the basis of whether or not it facilitates discrimination, even by private parties.

In the *Evans* case, the city of Macon, Georgia, had became involved in the administration of a public park under a private will which limited use of the park to white

persons. The city had recognized in recent years that, under the Fourteenth Amendment, it could not exclude Negroes from the park. See *Pennsylvania* v. *Board of Trusts*, 353 U. S. 230 (1957). A suit was brought in the Georgia courts by the Board of Managers of the park against the city to compel it to resign as trustee so that the provision of the will requiring exclusion of Negroes could be observed. The city thereupon tendered its resignation which was accepted and private trustees were appointed by the state court. The only reason for the appointment of the private trustees was to enable Negroes to be excluded from the park.

This Court reversed the action of the state court on grounds which are pertinent to the present case. It pointed out that, "The action of a city in serving as trustee of property under a private will serving the segregated cause is an obvious example" of "[C]onduct that is formally 'private' " but which has "become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U. S. at 299. The essence of the opinion was that the state-private involvement which brought about Fourteenth Amendment control had not become "disentangled" (*id.* at 302).

The same week that this Court decided *Evans* v. *Newton*, the United States Court of Appeals for the Fourth Circuit decided *Hawkins* v. *North Carolina Dental Society*, 355 F. 2d 718 (C. A. 4, 1966). The plaintiff in that case, a Negro, sued for admission as a member of the North Carolina

Dental Society, basing his claim primarily upon the fact that members of the society, by statute, elected the State Board of Dental Examiners, a governmental body. Following the filing of the case, the state repealed the statute. The court nevertheless took note of the fact that, in actual practice, the Dental Society still exercised the powers it had had under the statute. Accordingly, the court held that the limitations of the Fourteenth Amendment still applied and that the plaintiff was entitled to admission to this state agency.

These cases, *Evans* and *Hawkins*, have the common characteristic that, once state control attaches, bringing in Fourteenth Amendment limitations, repeal of the legislation or other termination of the state control does not automatically remove the impact of those limitations. At the very minimum, the burden is upon those formerly subject to the limitations to show that there has been complete "disentanglement."

In this case, the State of California had enacted fair housing legislation. This legislation was not a mere fortuitous sally into the area of housing regulation. It was a recognition by the State that it had a duty under its police power to take action against housing discrimination in order to prevent and eliminate inequality and other serious social evils. Having recognized its obligation and having provided a remedy to enforce the right to that protection, the state cannot now divest that right. Indeed, *Evans* and *Hawkins* are but particular examples in a racial context of the constitutional rule established by this Court in *Truax* v. *Corrigan*, 257 U. S. 312, 329 (1921).

> It is true that no one has a vested right in any particular rule of the common law, but it is also true that

> the legislative power of a State can only be exercised in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.

Implicit in the *Evans* and *Hawkins* rulings is the concept that it is the fact rather than the legal structure of unequal protection that determines application of the Fourteenth Amendment. The State will not be allowed to avoid its constitutional obligation by attaching or removing labels or by fraudulently seeming to wash its hands of a responsibility which it cannot in truth avoid.

Over a period of years, the State of California enacted a series of laws which recognized that its pre-existing legal system resulted in unequal opportunity, because of race, to obtain a "necessary of life." *Block* v. *Hirsh*, 256 U. S. 135, 156 (1921). In *Evans*, this Court said, "* * * when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations" (382 U. S. at 299). It also quoted its earlier holding in *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946), that a State may not permit private enterprises "to govern a community of citizens so as to restrict their fundamental liberties * * *."

By repudiating the responsibility it acknowledged when it adopted its laws against discrimination in housing, to deal

with the evil of housing bias, California has done what these cases say it may not do. It has restored the system under which every housing unit placed on the market by private enterprise carries a label marking it as available only to members of one race. It has given private builders and other owners of real property the power not merely to "govern" communities but to create them in a manner that restricts "fundamental liberties."

It is also important that this Court, in *Evans,* recognized that discrimination in the park in question might not have been unconstitutional if the City had never been involved but that the involvement of the City created a "momentum" that could not simply be turned off by City withdrawal (382 U. S. at 301). So here, the state, recognizing the fundamental inequality in housing opportunity created under its laws, undertook to exercise its police power to bring about equality. Its present reversal of that decision constituted affirmative action in support of inequality that violated "the mandates of equality and liberty that bind officials everywhere." *Nixon* v. *Condon,* 286 U. S. 73, 88 (1932).

C. Article I, Section 26 places the support of the legal system of California behind racial discrimination in housing.

The decisions of this Court establish that racial discrimination by private individuals is not wholly beyond the reach of the Fourteenth Amendment. While it has held that there must be a nexus between individual action and the state in order to bring the Federal Constitution into play, state involvement need not rise to the level of direct

or affirmative action to trigger application of the Amendment.

A state law requiring individual discriminatory acts[30] is perhaps the most obvious form of state action through individual conduct but the application of the Fourteenth Amendment has not been limited to such flagrant situations. A state cannot exculpate itself merely by showing that a private person made the effective determination to engage in invidious discrimination or some other invasion of fundamental rights.[31] Implication of the state through official authorization or encouragement of unequal treatment of the races,[32] through the availability of its sanctions in support of such inequality,[33] or through failure to act in an area of state responsibility involving discriminatory conduct,[34] all have provided the occasion for invocation of the Fourteenth Amendment.

The new amendment to the California Constitution places the state's legal system squarely behind private acts of housing discrimination. The landlord who would deny Negroes the opportunity to rent or purchase is given the signal to proceed. But discrimination authorized or encouraged by the state has consistently been condemned under the Fourteenth Amendment, even though the decision to discriminate is left to private choice. See, *e.g.*, *Shelley*

30. *Buchanan* v. *Warley*, 245 U. S. 60 (1917).

31. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

32. *Anderson* v. *Martin*, 375 U. S. 399 (1964).

33. *Shelley* v. *Kraemer*, *supra*.

34. *Smith* v. *Allright*, 321 U. S. 649 (1944); *Terry* v. *Adams*, 345 U. S. 461 (1953); *Evans* v. *Newton*, 382 U. S. 296 (1966).

v. *Kraemer,* 334 U. S. 1 (1948); *Barrows* v. *Jackson,* 346 U. S. 249 (1953); *Anderson* v. *Martin,* 375 U. S. 399 (1964); *McCabe* v. *Atchison T. & S. F. Ry.,* 235 U. S. 151 (1914); *Nixon* v. *Condon,* 286 U. S. 73 (1932); *Boman* v. *Birmingham Transit Company,* 280 F.2d 531 (C. A. 5, 1960).

The new amendment implicates state agencies in discriminatory practices in a manner no different in principle than was the case in *Shelley* v. *Kraemer, supra.* There the enforcement of private discriminatory practices by state courts was determined to be state action within the Fourteenth Amendment. Under the new amendment, the state judiciary is brought into play on the side of discriminatory practices in an equally meaningful way, i.e., through protecting the act of discrimination against legal interference. The point is illustrated by *Abstract Investment Co.* v. *Hutchinson,* 204 Cal. App. 2d 242 (1962), where the court concluded that a Negro might defend an action of unlawful detainer by showing that his rental property was being taken from him solely on account of his color. Article I, Section 26, however, would deprive the Negro defendant of his defense on the ground that the landlord may decline to rent on any ground he chooses. Thus, the California courts would be required to strike the defense in a repetition of the *Abstract Investment* case. Plainly, if the Federal Constitution bars the state courts from enforcing eviction on racial grounds, as held in *Abstract Investment,* and the new amendment to the State Constitution prohibits the judiciary from preventing such an eviction, the Federal Constitution and Article I, Section 26 are at war.

It is simply not true that the new amendment merely places the state in a neutral position—neither encourag-

ing nor discouraging racial discrimination. The enactment of an affirmative state policy banning state interference with landowners who discriminate against racial minorities cannot be equated with the absence of statutory law relating to discrimination.

Unlike the situation that would exist if present fair housing legislation were merely repealed, the new amendment (1) prevents the development of common law judicial remedies against private acts of racial discrimination, (2) precludes future State and local legislative action against private acts of racial discrimination, no matter how moderate the action or how pressing its need, and (3) enshrines in the California Constitution the grant of an "absolute" right in owners of real property to discriminate on racial and religious grounds. This we submit is not "neutrality." It constitutes action of the State directly sanctioning, encouraging and empowering private acts of racial discrimination. There is, in fact, a difference in kind between state failure to prohibit private acts of racial discrimination (no fair housing legislation) and amendment of a state constitution making private acts of racial discrimination a protected "right." In the former instance, private acts of racial discrimination are, to be sure, not prevented by legislation, but in the latter instance, they are actually encouraged and empowered by the State.

The new amendment on its face tends to encourage racial discrimination in housing on the part of those who desire to engage in it. As observed in *Barrows* v. *Jackson*, 346 U. S. 249, 254 (1953), there is unconstitutional encouragement of the practice of writing racially restrictive cove-

nants when the state places "its sanction behind the [discriminatory] covenants." Enactment of a constitutional provision placing acts of discrimination by all those who own real property beyond the reach of the state courts, the State Legislature and every governmental agency in the state encourages discrimination in housing just as surely as placing race labels on the ballot "require[s] or encourage[s]" discrimination in voting. *Anderson* v. *Martin*, 375 U. S. 399, 402 (1964). In neither case is discrimination compelled by the state; in both, it is at least facilitated. This is not "neutrality." By adding Article I, Section 26 to its constitution, the state has placed its thumb on the scale and tipped it in favor of discrimination.

The encouragement and assistance which the new amendment affords to discrimination becomes even clearer upon consideration of the background events which led to its adoption. The measure was sponsored by the California Real Estate Association and the California Apartment Owners Association, and it was made clear during the efforts to obtain signatures on the initiative petition that the proposal was intended to nullify the Rumford Act and other fair housing laws.[35] The official ballot argument in favor of the measure disclosed the same purpose.[36] It is of course general public knowledge that the campaign respecting the proposed amendment was principally concerned with the issue of racial discrimination. In short, the purpose and

35. See, for example, Editorial in Vol. XLIV, Issue No. 2 of California Real Estate Magazine (Dec. 1963), the official publication of the California Real Estate Association.

36. The argument asserted that "Under the Rumford Act, any person refused by a property owner may charge discrimination." It urged voters to enact the proposed amendment in order to free property owners of any such charges.

expected effect of the measure was to free property owners from legal restrictions against discriminatory practices in housing. Indeed, racial considerations in the transfer of property constituted the only matters in controversy in respect to the amendment; neither proponents nor opponents were in disagreement as to other considerations that might motivate a landowner to decline an offer to buy or rent, and there was no occasion to propose legislation in this respect.

In light of this single-minded purpose of the new amendment, its constitutionality need not be evaluated in terms of its language alone. State laws or actions which seem neutral when considered in a vacuum are the equivalent of unconstitutional discriminatory state action where, as in the present case, it can be shown by reference to surrounding circumstances that the purpose and necessary effect is to bring about racial or religious discrimination. For example, in *Griffin* v. *School Board,* 377 U. S. 218 (1964), the State of Virginia closed its public schools in one county but continued to operate its public school system in the other counties. This Court found it unnecessary to consider whether the state had authority to close its schools for lawful reasons since it concluded, on the basis of external circumstances surrounding the closing, that that was not the case. As the Court stated (377 U. S. at 231):

> (The) public schools were closed and private schools operated in their place with state and county assistance, *for one reason, and one reason only*: (to discriminate against Negro children). (Emphasis added.)

In the light of this motivation, the state action took on an unconstitutional aspect.

To the same effect, see *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), where the circumstances surrounding a state reapportionment act were inquired into for the purpose of ascertaining whether the districts were composed "with racial considerations in mind." See also, *Guinn* v. *United States,* 238 U. S. 347 (1915); *Lane* v. *Wilson,* 307 U. S. 268 (1939); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960).

The external evidence relating to the enactment of the new amendment inescapably leads to the conclusion that it was conceived, prepared, submitted for signatures, presented to the voters and enacted with a single purpose in mind—emasculating fair housing legislation and immunizing discriminatory landowners against state regulation. In these circumstances, it cannot be validly argued that the new amendment does not constitute state encouragement of racial discrimination. Property owners have been told in effect that the state law stands behind any refusal by them to sell or rent to Negroes or members of other minority groups. And this is indeed the case. If the new amendment is allowed to stand, no statutory or common law remedy will be available under state law against racial discrimination in housing sales and rentals. The Fourteenth Amendment, however, does not permit state involvement of this character in discrimination of so invidious a nature. For that reason alone, the amendment cannot stand.

D. Article I, Section 26 violates the Equal Protection Clause because it authorizes and facilitates racial zoning.

Fifty years ago, this Court held that the Fourteenth Amendment bars state and local legislation dividing residential areas into "white" and "colored" zones. *Buchanan*

v. *Warley,* 245 U. S. 60 (1917); see also, *Harmon* v. *Tyler,* 273 U. S. 668 (1927); *Richmond* v. *Deans,* 281 U. S. 704 (1930). Subsequently, in the *Shelley* case, *supra,* it barred attainment of the same result through court enforcement of privately initiated racial covenants. Article I, Section 26 has the effect of authorizing and sanctioning achievement of racial zoning by organized and concerted, or at least parallel, action by those who control the housing market.

The result of permitting discrimination by those who sell or rent housing is not merely to sanction occasional refusals here and there of individual housing units. The principal result, and the only one involved here,[37] is to sanction the imposition of "whites only" barriers at the entrances to apartment houses, suburban developments and even entire towns. Particularly with the phenomenal growth in the size of housing developments—both rental and for sale—since World War II,[38] the creation of whole new towns by a single company has become commonplace. Article I, Section 26 sanctions *de facto* racial zoning for these areas.

The *Buchanan* case dealt with zoning at the block level. Article I, Section 26 would in effect permit racial zoning by private owners from the block to the city level.

37. It should be remembered that the cases now before this Court do not involve the sale or rental of single family homes but the rental of apartments in multiple dwellings. Indeed, the California statutes affected by Article I, Section 26 do not reach discrimination by owner-occupants of single family homes. They apply only to the kind of housing that is under the control of those to whom housing is a business.

38. McEntire, *Residence and Race* (U. Cal. Press, 1960), pp. 176-177. See also "Construction Reports—Sale of New One-Family Homes," Series C25, Departments of Commerce and Housing and Urban Development, jointly—C25-26 (1963), C25-27 (1964), C25-65-13 (1965), page 1 of each report.

We submit that such *de facto* racial zoning cannot be permitted on the theory that it is initiated by private action and that the state does no more than facilitate it by permissive legislation. The structuring of communities is a governmental function—no different in constitutional significance from the control of voting which this Court protected from discrimination by private parties in *Smith* v. *Allwright*, 321 U. S. 649 (1944). There, this Court said (at 664):

> This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.

Here, it is the determination of occupancy patterns which the state is permitting by "casting its * * * [laws] in a form which permits a private organization to practice racial discrimination * * *." Here, as there, constitutional significance should be denied "so slight a change in form * * *" (321 U. S. at 661).

Directly applicable here, we submit, is the line of argument that controlled this Court's decision in *Marsh* v. *Alabama*, 326 U. S. 501 (1946). There, it was held that the Fourteenth Amendment guarantee of due process (in its application to freedom of expression) protected the distribution of literature on the streets of a privately-owned company town. The Court first noted that such distribution could not be barred by municipal action and then went on to say (at p. 505):

> * * * From these decisions it is clear that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature.

The Court held that the same results could not be achieved by the action of a single owner, saying (at p. 506): "Ownership does not mean absolute dominion." Referring to the fact that the owner was acting as a private entity, the Court said (at p. 507):

> * * * Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.

It concluded that the action of the state in effectuating the restriction by prosecuting those who distributed the literature violated the Fourteenth Amendment.

Here, it is accepted that the state could not limit occupancy in any area to persons of one race. Yet it is claimed that Article I, Section 26 can constitutionally permit owners of property to achieve the same result. We submit that the requirements of the Fourteenth Amendment cannot so easily be evaded.

The concept that the state cannot be viewed as a neutral party in the shaping of communities, and particularly the racial aspect of communities, is buttressed here by the fact that the state of California has never been neutral in this matter. Whatever may be said about whether a state vio-

lates the Equal Protection Clause simply by having a code of law which, by its silence, permits but does not discourage housing discrimination, that is not the case here. As shown in the brief for respondents (pp. 11-13), California has, for nearly a century, played an active role through its laws in affecting the racial composition of residential areas. It makes little difference that at times the state policy has been to favor segregation and in others to curb it. The essential fact is that California law has not been "neutral." It cannot now become "neutral."

E. The Fourteenth Amendment prohibits a state from disabling itself from fulfilling its constitutional responsibility to assure equality in housing.

Even if it were assumed that the Fourteenth Amendment imposes no obligation or responsibility on a state to enact or maintain urgently needed fair housing legislation, it would impose, we submit, at least the obligation to maintain the availability of the police power of the state to act in this area. In purporting to preclude exercise of that remedial power by adopting Article I, Section 26, California has done what this Court has said it may not do in the *Second Slaughter House Case, Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 753 (1883):

> No legislature can bargain away the public health or the public morals. *The people themselves cannot do it*, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the *special exigencies of the moment may require.* Government is organized with a view to their preservation, and cannot devest (sic) itself of the power to provide

> for them. For this purpose the legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. (Emphasis added.)[39]

This is not to say that a state which has enacted fair housing legislation may never repeal it. There may, of course, be many situations in which the state could constitutionally repeal such legislation, such as when the Legislature finds that the need no longer exists. Here, however, the state has gone beyond repeal and has disabled itself from carrying out a responsibility laid upon it by the Fourteenth Amendment. It has thereby "parted with" the "legislative discretion" to deal with housing inequality "as the special exigencies of the moment may require." The *Second Slaughter House* case establishes that that may not be done.

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39. The unconstitutionality of the instant disablement is further demonstrated by analogy to other illegal disablements of fundamental power. For example a state canot disable its courts from hearing and granting relief on federal causes of action. *Testa* v. *Katt,* 330 U. S. 386 (1947). A government cannot disable its courts, even in a wartime emergency, from considering a defense in a criminal case that the law being enforced is invalid, unless an alternative and effective procedure for reviewing the validity of the law is available to the defendant. *Yakus* v. *United States,* 321 U. S. 414 (1944). Similarly, it is extremely doubtful that courts could be disabled from exercising the power to issue writs of habeas corpus in appropriate cases. See *Eisentrager* v. *Forrestal,* 174 F.2d 961, 965-966 (1949), reversed on other grounds, 339 U. S. 765 (1950).

POINT THREE

Article I, Section 26 violates the guarantee in 42 U. S. C., Section 1982 of the right of all citizens of the United States to equal opportunity to purchase or lease property without discrimination based on race.

Article VI, Section 2 of the United States Constitution, the Supremacy Clause, provides:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U. S. C., Sec. 1982 reads as follows:

> All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

If, as we believe, Section 1982 validly guarantees to all citizens the right to purchase or lease property free of discrimination based on race, it nullifies Article I, Section 26 to the extent that it purports to deny that right.

A. History of Section 1982

Less than four months after the adoption of the Thirteenth Amendment, Congress enacted the Civil Rights Act of 1866,[40] its first post-Civil War civil rights act. It did so by overriding the veto of President Andrew Johnson. The

40. Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27 (1866).

Thirteenth Amendment had become law on December 18, 1865. It abolished slavery and sought to eradicate all forms and incidents of slavery and involuntary servitude.[41] It declared and vindicated those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.[42] Section 1 of the Civil Rights Act of 1866 read in part:

> That all * * * citizens, of every race and color * * * shall have the same right in every State and Territory in the United States * * * to inherit, purchase, lease, sell, hold, and convey real and personal property * * *[43]

The Fourteenth Amendment was not ratified until July 28, 1868. It read in part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 2 and 5 of the Thirteenth and Fourteenth Amendments, respectively, empower Congress to enforce their provisions by appropriate legislation.

Thereafter, on May 31, 1870, Congress enacted a second Civil Rights Act[44] which sought to protect the recently freed

41. *Clyatt* v. *United States*, 197 U. S. 207, 217 (1905).

42. *Civil Rights Cases*, 109 U. S. 3, 22 (1883).

43. See fn. 40, *supra*.

44. Civil Rights Act of 1870, ch. 114, 16 Stat. 140 (1870).

slaves from discrimination. Included in this Act as Section 18 thereof was a specific reenactment of the Civil Rights Act of 1866. This act was thereafter recast and embodied in its present form as it appears in Section 1982 of Title 42 in the general statutory revision of 1875 when it was designated as Revised Statutes, Sec. 1978.

B. The Thirteenth Amendment

The Civil Rights Act of 1866 was first enacted after the adoption of the Thirteenth Amendment and before the adoption of the Fourteenth Amendment. It is clear that the Thirteenth Amendment is applicable to the actions of private persons and there is no need for "state action" to trigger federal power and action under its terms. Even when this Court in the *Civil Rights Cases, supra,* was establishing "state action" as a prerequisite for invoking the protections of the Fourteenth Amendment and the civil rights acts enacted pursuant to Section 5 of that Amendment, it also conceded that the Thirteenth Amendment gave "power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure."[45] Hence, if the Civil Rights Act of 1866, our present Section 1982 of Title 42, which was enacted under the authority of Section 2 of the Thirteenth Amendment,[46] is read as being applicable to actions by private persons who violate rights

45. *Civil Rights Cases, supra,* 109 U. S. at 22. See also *United States* v. *Harris,* 106 U. S. 629 (1882); *Clyatt* v. *United States,* fn. 41, *supra.*

46. *United States* v. *Harris, supra,* 106 U. S. at 640.

it protects, without the slightest color of "state action", it is clear that such legislation is within the power granted to Congress by the Thirteenth Amendment.

That it should be so read, we believe, follows from the fact that it was enacted to implement the Thirteenth Amendment which was designed to end the incidents of slavery, however manifested. That is the implication of this Court's decision in the *Civil Rights Cases, supra*, 109 U. S. at 22:

> Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.

C. The Fourteenth Amendment

As already noted, the Civil Rights Act of 1866 was reenacted as a portion of the Civil Rights Act of 1870. We respectfully submit that this reenactment did not impose on that Act the "state action" limitation of the Fourteenth Amendment and that, consequently, this Court's dictum in *Hurd* v. *Hodge,* 334 U. S. 24, 31 (1948) that Section 1982 applies to "governmental action" should not be treated as a limitation on the section.

The history of the adoption of the two Amendments plus the Fifteenth and the post-Civil War civil rights acts points

strongly to an intent to expand and strengthen the safeguards embodied in those Amendments and acts. The aim was to insure the end of all uses of private as well as public power to seek to hold the freed Negro slaves in subjection or to deny them any of the rights essential to make them free, full and equal participants in the body politic and the economic life of the country with their white co-citizens. The view of the 1866 Act contained in the *Hurd* dictum conflicts with that history and the intent of the framers of the Amendments and the acts. The reenactment in 1870 was clearly intended to extend the ban on private denial of the right to purchase and lease property to any similar action by the state. A contrary reading would transform into words of limitation, words of expansion of statutory remedy intended to meet new variations of the evil struck at. It would ignore the familiar canon of statutory interpretation that the reenactment of a statute effects no change in the law but merely continues the original law in force. 50 Am. Jur., Statutes §441.

Also relevant to any consideration of the impact of the reenactment of the 1866 Act in 1870 after the adoption of the Fourteenth Amendment, is an examination of the understanding of scholars close in time to the original events. A careful analysis of the legislative history of the Fourteenth Amendment based on a study of the debates in Congress and newspaper reports on the ratification debates in the various states, as embodied in a book published in 1908, led the author, H. E. Flack, to conclude that, when it was approved by Congress, its proponents in that body believed that under it "Congress would be authorized to pass any law which it might declare 'appropriate and necessary' to

secure to citizens their privileges and immunities together with the power to declare what were those privileges and immunities."[47] The author also expressed the view that the framers of the Amendment believed they were making a great change in the powers of the Federal Government and that "their failure to do this is due to the strained construction put upon their work by the Supreme Court."[48] He concluded,

> However futile were the efforts by Congress to give vitality to the Amendment as interpreted by itself and by those who had the most to do with its drafting and adoption, the fact remains that nearly all the evidence goes to sustain the position of Congress as far as the question of power and authority is concerned. [The evidence shows that] according to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several state Legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by the States.[49]

Recent decisions of this Court reflect an acceptance by at least six members of the view expressed above about the applicability of the provisions of the Fourteenth Amendment to private action.[50] These decisions indicate that Section 5 authorizing Congress to enact appropriate legisla-

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47. Flack, *The Adoption of the Fourteenth Amendment* (Johns Hopkins Press, 1908), at p. 82.

48. *Id.*, at p. 69.

49. *Id.*, at p. 227.

50. *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Bell* v. *Maryland*, 378 U. S. 226 (1964); *United States* v. *Guest*, 383 U. S. 745 (1966). The first two of these cases are discussed in Robison, J. B., "The Possibility of a Frontal Assault on the State Action Concept," 41 *Notre Dame Lawyer* 455, 458-60 (1966).

tion to enforce the substantive guarantees of the Amendment is a broad grant of power and that, even if that Amendment, of its own force, does not forbid private discrimination, Section 5 comprehends legislation punishing private persons who for racial reasons engage in acts which interfere with Fourteenth Amendment rights. Included in those rights under the privileges and immunities guaranteed to all is the right to purchase or lease property. *Civil Rights Cases, supra; United States* v. *Morris,* 125 Fed. 322 (1903). In *Shelley* v. *Kraemer, supra,* this Court said (334 U. S. at 10-11):

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

In *U. S.* v. *Guest,* 383 U. S. 745 (1966), six members of this Court, although not speaking for the Court, indicated acceptance of the position that Congress has power under the Fourteenth Amendment and, therefore, has had, since the adoption of that Amendment, the power to enact legislation directed against private conspiracies interfering with the exercise of rights protected under the Amendment. Although Mr. Justice Stewart in his opinion for the Court refused to re-examine the doctrine of a requirement of state action, basing his decision on a finding that state action was involved in the defendants' conspiracy, Mr. Justice Brennan, concurring in an opinion in which he was

joined by the Chief Justice and Mr. Justice Douglas, noted that "a majority of the members of the Court express the view today that §5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy" (383 U. S. at 782). In a footnote, Mr. Justice Brennan noted that a majority of the Court took this view, consisting of the three Justices joining in his concurring opinion plus the three joining in Mr. Justice Clark's opinion, Justices Clark, Black and Fortas. These latter accepted Mr. Justice Stewart's construction of the indictment that it showed state action but also stated their belief that the specific language of Section 5 of the amendment empowered Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.

If this is true in the case of rights under an Amendment purporting to protect against state action, it is necessarily true also with respect to rights established against all persons, private as well as state-authorized, as is the case under the Thirteenth Amendment. But in any case, it is clear that the 1866 Act, even if it is considered, *arguendo*, as involving Fourteenth Amendment rights because of its reenactment after the adoption of that Amendment, is within the constitutional power of Congress to enact and make applicable to private action. It appears also that the authority of the decision in the *Civil Rights Cases* and its limitation of the Civil Rights Act of 1875, and possibly those of 1870 and 1866, to state action, is now highly questionable if it has any weight at all.

D. The Effect of Section 1982 on Article I, Section 26

We submit that Section 1982, viewed in the light of the preceding pages, is directly at war with Article I, Section 26 of the California Constitution. Section 1982 secures to Negroes and all others the right, essential under our free democratic system, to purchase or lease real and personal property equal to that held by white citizens. Article I, Section 26 purports to secure to all owners of real property in California the right to decline to sell or lease their real property on any basis, including the race of the would-be purchaser. Each of these rights necessarily excludes and contradicts the other. The power to buy or lease real property without discrimination cannot exist and be secured as long as the right to sell or rent real property with discrimination is protected by law. One of these conflicting rights must yield. The Supremacy Clause requires that Section 1982 must prevail.

This conclusion is required regardless of whether Article I, Section 26 is found to represent "state action" or "neutrality" on the part of the state in the practice of racial discrimination in housing. If, as we believe we have shown, Section 1982 is a valid exercise of Congressional power, under the Thirteenth or Fourteenth Amendments, to prohibit discrimination by private persons, it is the "Supreme Law of the Land" and Article I, Section 26 is unconstitutional.

Conclusion

It is respectfully submitted that the decision of the California Supreme Court should be affirmed.

Respectfully submitted,

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